STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

North Shore Gas Company	)	
	)	**Docket No. 12-0511**
Proposed General Rate Increase for Gas Distribution Rates	)	
	)	
	)	
Peoples Gas Light and Coke Company	)	
	)	**Docket No. 12-0512 (cons.)**
Proposed General Rate Increase for Gas Distribution Rates	)	**On Rehearing**

BRIEF ON EXCEPTIONS AND EXCEPTIONS OF THE PEOPLE OF THE STATE OF ILLINOIS

The People of the State of Illinois

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NOW COME the People of the State of Illinois ("the People"), by Lisa Madigan, Attorney General of the State of Illinois, pursuant to Part 200.830 of the Illinois Commerce Commission's ("the Commission") rules, 83 Ill.Admin.Code Part 200.830, and in accordance with the schedule established in this docket, hereby file their Brief on Exceptions and Exceptions to the Proposed Order ("PO") issued by the Administrative Law Judges (ALJs) in the above-captioned docket on November 20, 2013, which will establish whether to include 2012 Net Operating Losses ("NOLs") in rate base for Peoples Gas Light & Coke Company ("PGL") and North Shore Gas Company ("NS")(collectively "the Companies").

I. 2012 NOLs

A. The Proposed Order Improperly Places a Burden of on the People to Prove the Unreasonableness of the 2012 NOL Adjustments.

In its analysis, the Proposed Order misstates longstanding precedents on the burden of proof in Section 9-201 rate proceedings when it notes that

> the AG and CUB-City waived filing direct testimony and chose not to file rebuttal testimony. The Commission granted rehearing to the AG and CUB-City on this issue to give them the opportunity to provide any additional or opposing relevant evidence.

PO at 20. Not only does this analysis misstate established evidentiary standards, it places an improper burden on the intervenors, and it skews the very purpose of this rehearing. The Commission should therefore reject the conclusions of the Proposed Order and find that the record evidence does not support including NOL in the rate base.

First, the Proposed Order's conclusion that the People "waived" the opportunity to file direct testimony wrongly assumes that the People and other intervenors had an obligation to provide evidence on rehearing. Section 9-201(c) of the Public Utilities Act (the Act) makes it clear that the Utilities -- not Staff or Intervenors -- have the burden of proving the requested adjustment:

> In such hearing, the burden of proof to establish the justness and reasonableness of the proposed rates or other charges, classifications, contracts, practices, rules or regulations, in whole and in part, shall be upon the utility.

220 ILCS 5/9-201(c). It was not the obligation of the People, Staff or any other intervenor to attempt to explain the Companies addition to rate base and the Proposed Order should be changed to recognize this most rudimentary evidentiary principle. *See People ex rel. Hartigan v. Illinois Commerce Com'n*, 117 Ill.2d 120, 135-6, 510 N.E.2d 865, 871 (1987). In its current form, the Proposed Order presents an unlawful switching of the burden of proof that merely serves to distract the Commission from the fact that the evidence presented on rehearing provides no additional support to justify the Commission's original conclusion on NOLs.[1]

[1] As will be described in greater detail in the section below, the People, Staff, and other intervenors have demonstrated that the Companies failed to meet their burden in the case below. *See* AG IB at 6-10; Staff IB at 6-8; CUB/City IB at 7-8.

Secondly, contrary to the Proposed Order's finding that "the Commission granted rehearing to the AG and CUB-City on this issue to give them the opportunity to provide any additional or opposing relevant evidence" (PO at 20), the purpose of the AG and CUB/City rehearing requests was *not* to provide an opportunity for the parties to submit additional evidence. The applications for rehearing filed by the People and CUB/City presented similarly defined parameters for this rehearing. The People's application for rehearing sought reconsideration of the Commission's decision to include NOLs in rate base based on the People's clearly stated position that "the Commission's decision to recognize an NOL for the 2012 time period, which increases rate base by more than $38 million, is contrary to law, *not supported by substantial evidence*, arbitrary and capricious and beyond the jurisdiction of the Commission, contrary to Section 10-201(e)(iv)(A-D) of the Act." 12-0511, AG Application for Rehearing (July 19, 2013) at 13. (Emphasis added). CUB/City's application for rehearing similarly sought review of this issue because the Companies had not supported their position. 12-0511, CUB/City Application for Rehearing (July 19, 2013) at 10. In granting rehearing, the Commission granted (1) the Companies' request to correct what they viewed as an improper calculation related to NOLs and (2) the People's and CUB/City's requests for rehearing and reconsideration of the decision to include the 2012 NOLs in the Companies' rate base.

In addition, the People could not have been clearer from the outset of the rehearing that they were seeking rehearing for purposes of the Commission reconsidering its decision on the 2012 NOLs. At the first status hearing after rehearing was granted, the People explicitly outlined their view on the purpose of the rehearing when counsel for the People stated on the record that:

> In granting our -- the People's application for a hearing as well as Sub City's [sic] application for a hearing, it is our view that the Commission -- those applications simply sought reconsideration of the Commission's conclusion on the 2012 NOL. For that reason, it is unlikely that the ratepayer advocates would be filing any

> testimony related to that issue given that there was a lack of evidence on the 2012 NOL.
>
> Also, the ratepayer advocate's applications for rehearing did not -- rules require to seek specific allegations of the need for additional evidence or a description of what evidence would be filed related to the 2012 NOL, (the) application for the rehearing addressed what we believe was a lack of evidence on the part of the Company to support the 2012 NOL.

Docket No. 12-0511, Transcript (August 22, 2013) at 7-8. As demonstrated in the very first status on this case, the People have held the position that they had no obligation to file evidence on the Companies 2012 NOL. The Proposed Order's acceptance of the Companies' argument that the People waived filing additional testimony is, therefore, an improper statement of the law relating to this issue and it must be altered. 220 ILCS 5/9-201(c).

The Proposed Order also accepts the Companies' unsupported argument that Staff, the People, or other intervenors should have addressed the 2012 NOL in *direct* or *rebuttal* testimony in the case below. PO at 19-20. The record is clear in this case that up until the Companies filed surrebuttal testimony (after a point when, procedurally, the People would have *any* opportunity to respond in prefiled testimony), the Companies had repeatedly stated that there would not be a deferred tax asset related to an NOL that would be placed into rate base. *See* AG IB at 6-8; Staff IB at 6. As an example, in their direct case in the original docket, the Companies originally stated that

> There is currently no forecasted net operating loss ("NOL") deferred income tax asset. This results from the assumption that while [the Utilities] may be generating taxable losses, the consolidated group is assumed to be able to use those losses. Under the Companies tax sharing agreement, [the Utilities] will be paid cash for the tax benefit of its loss, if any, generated on a standalone basis, and used to reduce consolidated tax obligations. [The Utilities] will therefore not have a deferred income tax asset for the NOL. This assumption will be monitored / updated at each step in the case.

NS Ex. 5.1, Schedule G-5 at 10; PGL Ex. 5.1, Schedule G-5 at 10-11. As the original docket proceeded, the Companies provided no clear indication that there would be any NOL on either a consolidated or stand-alone basis. It is inconceivable to imagine that the People would waste precious resources responding to what amounted to a non-issue at the direct and rebuttal phase of the original hearing. As established at various points throughout the rehearing, the NOL did not become an issue until the Companies filed their surrebuttal testimony.

The Proposed Order also appears to recite the history of this docket in such a way as to presume that the Companies were up-front about the existence of an NOL obligation and that the parties should not have been surprised by the last-minute addition of the NOL at the surrebuttal stage. PO at 19. The People simply reiterate that the Companies have admitted that "at the time they filed rebuttal testimony on December 18, 2012, the Utilities were still *forecasting* that the consolidated group's income would be able to absorb these losses" and that it "was not until Integrys' books closed for the 2012 year and *actual* numbers were available, however, that the Utilities found out the Integrys consolidated group was in a loss position and could not absorb the Utilities' standalone 2012 NOLs." Companies IB at 9. In light of this clear admission that the intervenors were not made aware of the NOL until the tail end of the case, the conclusions of the Proposed Order are perplexing, and any statements appearing in the Proposed Order that suggest the People and other intervenors had some duty to respond to a non-issue must be stricken.

B. The Companies Have Not Met Their Burden of Demonstrating the NOL

As noted above, the People have no burden to prove unreasonableness in this case, and given limitations on resources, neither the People nor Staff have any reason to respond to an issue before it actually becomes an issue. Notwithstanding those facts and contrary to the conclusions of the Proposed Order, the Companies never produced evidence explaining the 2012 NOL and why it could not be absorbed by "the consolidated group." It is well established that

proof of reasonableness must be based on substantial evidence, meaning "more than a mere scintilla; it is evidence that a reasoning mind would accept as sufficient to support a particular conclusion." *Commonwealth Edison Co. v. Illinois Commerce Commission*, 405 Ill.App.3d 389, 398 (2010) (internal quotations and citations omitted). As noted above, the Proposed Order appears to conclude that the 2012 NOLs should be included in rate base not because the Companies supported them with sufficient evidence, but because Staff and the Intervenors failed to prove them unreasonable. This conclusion hardly rises to the requisite level of "substantial evidence" necessary to prove that the adjustment to rate base is reasonable. *See also Hartigan*, 117 Ill.2d at 135-6, 510 N.E.2d at 871 ("[r]equiring intervenors to establish unreasonableness is therefore no substitute for requiring proof of reasonableness"). The late-filed NOL request added some $38 million to the PGL rate base. Stating that "the consolidated group" cannot absorb this unexplained loss does not rise to the level of prima facie evidence that Section 9-201 demands.

As a result of the Proposed Order's curious shift on the burden of proof, it apparently accepts the Companies' proffered evidence as sufficient cause to justify including the alleged 2012 NOLs in the Companies' rate base. PO at 19-20. For the following reasons, the People disagree with this conclusion and urge the Commission to find that the Companies failed to support including the NOLs in rate base.

First, as noted by the People in their Initial Brief, the Companies mischaracterize their own prefiled testimony by arguing that "substantial" evidence showed that the 2012 NOLs existed and would be included in rate base. AG IB at 6-7. Specifically, the Companies point to their Schedule G-5 and various data request responses in support of their argument (s*ee* Companies IB at 7), but as demonstrated by the People, the Companies' own testimony defeats

their position.[2] Further, as late as December 2012, the Companies still took the position that: "no deferred tax assets exist at the end of 2012 due to the consolidated group's income." NS-PGL Ex. 30.0 Rev. at 28; Companies IB at 8. The Companies' attempt on rehearing to argue that they were forecasting 2012 NOLs at the time of direct testimony is, therefore, an outright mischaracterization of the record evidence.

The remaining details provided by the Companies in support of the 2012 NOL are sparse, at best. The People drew attention to the surrebuttal testimony of Companies witnesses Mr. Hengtgen and Mr. Stabile wherein each points a finger at the other and claims that the other witness will provide the reason for the NOLs. AG IB at 4-6; *see* NS-PGL Ex. 43.0 at 26; NS/PGL Ex. 46 at 36. In the end, however, neither witness explains the basis for the 2012 NOL. AG IB at 4-5. It is important for the Commission to remember that the addition of these NOLs places millions of dollars of ratepayer money at stake. The Companies, however, merely note that something showed up on the books of "the (Integrys) consolidated group" at the close of 2012. NS/PGL Ex. 46 at 36. But there is no explanation as to what triggered the NOL and there was no witness from the consolidated group to explain their inability to absorb the loss. This type of evidence would have been critical to ensuring that the Commission had the information it needed because a change in circumstance with the consolidated group was the alleged cause of the change in status of the NOLs.

Commission Staff agrees with the People that the record evidence presented in the original docket and on rehearing does not support the Companies' position. Staff IB at 6.

[2] Schedule G-5, filed in June 2012, plainly states that "[The Utilities] will therefore not have a deferred income tax asset for the NOL." NS Ex. 5.1, Schedule G-5 at 10; PGL Ex. 5.1, Schedule G-5 at 10-11; *see also* Companies IB at 7. The data requests cited by the Companies in their Initial Brief *suggest* the possibility of an NOL in October and November. Staff Cross Exs. 12, 13, 14, 15.

Rather, according to Staff, the Companies "rely only on blanket threats to the Commission of what they think might happen if the 2012 NOLs are not approved." Staff IB at 6.

Finally, although it is not directly noted in the Proposed Order, the Companies also raised the issue of bonus depreciation as a justification for seeking to include NOL in rate base. The fact remains, however, that bonus depreciation (prior to the extension that was passed after January 1, 2013 by the U.S. Congress) was in existence throughout 2012. As noted in the People's Initial Brief on Rehearing, the Companies could have (and should have) estimated potential NOL effects on rate base as a result of the bonus depreciation in effect throughout 2012 as an issue either in its Direct or Rebuttal testimony filings. They did not, however, do so, and ratepayers should not be forced to pay the price for their inaction. AG IB at 6.

For the above reasons as well as those presented in the People's briefs in the rehearing of this docket, the People urge the Commission to reject the analysis and conclusion of the Proposed Order.

Exception 1 Proposed Language

In accordance with the arguments presented above, the Commission analysis and conclusion at page 19-20 should be modified as follows:

Commission Analysis and Conclusion

The Commission ~~again~~ finds that the Utilities failed to support inclusion of the 2012 NOLs ~~are properly reflected~~ in the Utilities' rate bases. ~~The Commission finds that the Utilities appropriately set forth its assumptions when they filed their direct cases. The Utilities clearly indicated that based on forecasts at the time, while Peoples Gas or North Shore may individually be generating losses, the consolidated group was forecasted to be able to absorb such losses. Through discovery and at their next opportunity when the Utilities filed their rebuttal testimony, an updated status of the NOLs was provided, indicating again that they were forecasting that the consolidated~~

group would be able to absorb the individual NOLs of Peoples Gas and North Shore. Because at the time the Utilities filed direct and rebuttal testimony the Integrys consolidated group was forecasted to absorb the 2012 standalone NOLs, they were not available to the Utilities to include in their rate bases and thus, it would have been improper at either the direct stage or rebuttal stage to include the NOL. Having notified parties as to the status of the 2012 NOLs at the direct and the rebuttal testimony stages, the Commission finds that the Utilities notified Staff and intervenors as soon as possible regarding the change of status of the 2012 NOLs in surrebuttal testimony. The Commission finds the Utilities' actions reasonable. Further, the Commission cannot approve on one hand adjustments based on actual data or new law, both only available in January 2013, which reduce the Utilities' rate bases and reject on the other hand an adjustment based on actual data and supported by the record that increases the Utilities' rate bases.

The Commission also finds that Staff, the AG and CUB-City in their direct and rebuttal testimony had the opportunity to challenge the Utilities' assumptions or proposed course of action should the Integrys consolidated group not be able to absorb the 2012 standalone NOLs. Staff's new position that there is insufficient evidence to include the 2012 NOLs in the Utilities' rate bases is extremely curious given the testimony that Staff submitted in the original phase of these proceedings. Furthermore, in response to Staff's discovery, the Utilities also provided estimates for the 2012 NOLs. Specifically, on October 23, 2012, the 2012 NOLs were estimated to be $1.9 million for North Shore and $51.6 million for Peoples Gas. Staff Cross Exs. 12 and 13, Utilities' responses to Staff data requests BAP 15.01. Staff witness, Bonita Pearce even reserved the right to propose adjustments in rebuttal testimony or in supplemental rebuttal testimony regarding the NOLs. While Staff requested and was granted leave to file supplemental testimony on other issues, there was no request to supplement Ms. Pearce's testimony. There also was the opportunity to conduct cross-examination at the original evidentiary hearing. However, they did not rebut that evidence in the original proceedings nor did any party do so on rehearing. Instead Staff filed neutral testimony and the AG and CUB-City waived filing direct testimony and chose not to file rebuttal testimony. The Commission granted rehearing to the AG and CUB-City on this

~~issue to give them the opportunity to provide any additional or opposing relevant evidence. The purpose of rehearing is to provide additional evidence or information for the Commission to consider. Thus, the Commission rejects the positions of Staff, the AG and CUB-City and the 2012 NOLS will be included in the rate bases.~~

The Companies produced insufficient evidence to explaining the 2012 NOL and why it could not be absorbed by "the consolidated group." It is well established that proof of reasonableness must be based on substantial evidence, meaning "more than a mere scintilla; it is evidence that a reasoning mind would accept as sufficient to support a particular conclusion." *Commonwealth Edison Co. v. Illinois Commerce Commission*, 405 Ill.App.3d 389, 398 (2010) (internal quotations and citations omitted).

The Companies mischaracterize their own prefiled testimony by arguing that "substantial" evidence showed that the 2012 NOLs existed and would be included in rate base. Specifically, the Companies point to their Schedule G-5 and various data request responses in support of their argument (s*ee* Companies IB at 7), but the Companies' own testimony defeats their position. Further, as late as December 2012, the Companies still took the position that: "no deferred tax assets exist at the end of 2012 due to the consolidated group's income." NS-PGL Ex. 30.0 Rev. at 28; Companies IB at 8. The Companies' attempt on rehearing to argue that they were forecasting 2012 NOLs at the time of direct testimony is, therefore, an outright mischaracterization of the record evidence.

The remaining details provided by the Companies in support of the 2012 NOL are sparse, at best. In the surrebuttal testimony of Companies witnesses Mr. Hengtgen and Mr. Stabile, each points a finger at the other and claims that the other witness will provide the reason for the NOLs. AG IB at 4-6; *see* NS-PGL Ex. 43.0 at 26; NS/PGL Ex. 46 at 36. In the end, however, neither witness explains the basis for the 2012 NOL. AG IB at 4-5. The addition of these NOLs places millions of dollars of ratepayer money at stake. The Companies, however, merely note that something showed up on the books of "the (Integrys) consolidated group" at the close of 2012. NS/PGL Ex. 46 at 36. There is no explanation as to what triggered the NOL and there was no witness from the consolidated group to explain their inability to absorb the loss. This type of evidence would have been critical to ensuring that the Commission had the information it needed

because a change in circumstance with the consolidated group was the alleged cause of the change in status of the NOLs.

Finally, the Companies also raised the issue of bonus depreciation as a justification for seeking to include NOL in rate base. The fact remains, however, that bonus depreciation (prior to the extension that was passed after January 1, 2013 by the U.S. Congress) was in existence throughout 2012. The Companies could have (and should have) estimated potential NOL effects on rate base as a result of the bonus depreciation in effect throughout 2012 as an issue either in its Direct or Rebuttal testimony filings. They did not, however, do so, and ratepayers should not be forced to pay the price for their inaction.

The Commission, therefore, accepts the position of Staff, the AG, and CUB-City and rejects the Companies' inclusion of the 2012 NOLs in rate base.

II. Revenue Requirement Schedules

Because the Proposed Order should be changed to reject the Companies' last-minute addition to rate base, the Proposed Order must also be changed to reflect the adoption of an appropriate revenue requirement schedule. The People recommend that the Commission apply the schedules adopted by Staff reflecting the removal of the NOLs from the Companies' respective rate bases.

Exception 2 Proposed Language

In accordance with the arguments presented above, the Commission analysis and conclusion at page 7 should be modified as follows:

Commission Analysis and Conclusion

~~The Utilities have proposed some corrections to the 2012 NOL ratemaking adjustment.~~ Since the Commission has found based on the record that the 2012 NOLs should not be ~~are properly~~ reflected in rate base (see Section II.B. of this Order), we therefore, ~~approve~~ reject those corrections proposed by the Utilities. Attached to this Order on Rehearing are the schedules presented by Staff, identified as Appendices A

and B which reflect the proper adjustments removing the effect of the NOLs on the rate base (and revenue requirement) of each company.

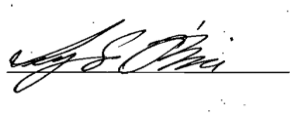
~~The Commission agrees to adopt Staff's alternative proposal requiring the Utilities' to provide a narrative description with illustrative calculations that would provide instructions for the Commission to calculate the impact of the NOL on current and deferred income taxes associated with each pending adjustment. Staff's recommendation is reasonable and will result in an improved process in future rate cases of the Utilities.~~

III. Conclusion

For all of the reasons stated above and in their Initial and Reply Briefs, the People of the State of Illinois urge the Commission to adopt a Final Order consistent with the recommendations in this Brief.

Respectfully submitted,

The People of the State of Illinois
LISA MADIGAN, Attorney General



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